Appendix

The brief filed by respondent Anglo Bank includes, in an appendix, a purported statement of facts. The following comments are in order:

Condition of the Record.

This appeal is based upon denial of a hearing on objections to a settlement. Issue was joined by the following pleadings:

1. Petition for termination of suit. (R. 314.)
2. Objections of petitioners Denicke and Doble. (R. 333, 340.)
3. Amended objections of petitioner Denicke filed after discovery. (R. 403.)

Proceedings on the Petition.

There was no evidence except that offered by the bank as part of its case in chief. This consisted of:

(a) *Testimony of bank officers.* William H. Thomson, President, and R. H. Holmberg, Assistant Secretary, testified at the request of the bank and were subjected to a cross-examination limited to examination in chief. (R. 1853-1882; 1846-1853.)

(b) *Documents offered during presentation of bank's case.* The Court received letters used on cross-examination of Thomson (R. 1857, 1863, 1865, 1870). As a part of its case, the bank offered the transcript and exhibits of July 1941. (R. 1846.)

And that was all. There was no hearing on objections. No evidence on objections. *The matter was continued* for *further hearing.* (R. 392.)

There is no presumption of good faith which can be indulged in favor of this corporation. Its conduct is subject to the same scrutiny which the law applies to others. (15 USCA 604.)

There was a motion for nonsuit. The District Court declined to rule on that motion. (R. 1888, 392, 438, 439.)

A hearing was demanded. A hearing was denied. There is no occasion for considering an alleged "statement of facts" based upon evidence offered by one side. It will be time enough to determine the essential facts when a full hearing has been granted.

We are including comment on some statements which appear in the appendix to the Anglo brief in order that this Court may have a more accurate picture of the situation.

Amount of stock. (Page i.)

Mr. Denicke and Mrs. Doble hold 1600 and 1752 shares, respectively. Their investment totals $100,000. They have a right to be heard. (*Pepper v. Litton,* 308 U.S. 295; *Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288.)

"New management"—April 1, 1939. (Page i.)

Between April 1, 1939 and February 14, 1940, the bank prosecuted an appeal from a judgment rendered in its favor of *Blum v. Fleishhacker.*[7]

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[7]Judicial notice is taken of contents of transcript on file in this Court in *Fleishhacker v. Blum,* Oct. Term 1940, Case No. 181, disclosing action of Anglo Bank contrary to stockholders' interests in that proceeding.

Denicke demanded abandonment of that appeal. The management was notified that it would be held liable for consequences. (R. 1569 at 1573.)

We were then informed that this matter had just come to the attention of the bank's counsel. (R. 1574.)

An explanation was requested. (R. 1205, 1578.) There was no explanation. (R. 1198-1199.)

On April 1, 1939, counsel now acting for the bank were engaged in an effort to dismiss suit on behalf of executive committee members charged with liability herein. (R. 51, 60.)

On April 21, 1941, the bank filed false answers to interrogatories. It concealed $3,901,067.18 in loans involving directors.[8]

Denicke insisted on appointment of independent counsel. (R. 1651 at 1665, 1667.) For at least five years, money belonging to stockholders had been expended in maintaining a collusive representation of their interests.[9]

Petitioners have demanded a trial. Their objections and offers of proof contain the following allegations which can only be determined by a hearing in open Court in accordance with Rule 77(b) FRCP:

> "The matter now before the court is being pressed with knowledge that the settlement figure tendered is inadequate; that *independent counsel would be successful in obtaining a much larger amount . . .*" (Offer No. 20 at R. 524.)

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[8]See schedule at page 15 of Petition for Certiorari.

[9]Use of corporate funds to pay litigation expense of directors held guilty of misconduct—amounts to breach of trust. (See California Civil Code Sec. 375 amended by Stats. 1943 Chapt. 1934; also Article by Prof. H. W. Ballantine, at 5 Cal. Law Review Dec. 1943 page 515.)

> *"A low figure was purposely presented in order to bring about an auctioning of these claims.* This was part of a plan to enable the directors to avoid substantial liability." (Offer No. 24 at R. 529.)
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> "The statement in said petition that the bank has made a careful investigation . . . that it has determined in good faith that (the litigation) be compromised, is untrue. *Neither the president nor the board of directors, nor the executive committee, nor counsel for the bank, have ever made such determination.*" (Offer No. 24 at R. 528.)

Amendments to pleadings. (Pages ii-iii.)

There was no opportunity for adequate discovery until after March 31, 1942. All prior pleadings were in skeleton form. We amended to meet an attack on the jurisdiction. The second amended complaint was filed after directors sought to dismiss on the merits. An amendment was lodged in September 1941, to prevent loss of rights on directors' loans. (R. 958, Item 367; 290.) The third amended complaint was lodged after entry of an ex parte decree. It is the only pleading ever presented after opportunity for discovery. (R. 537.) The bank opposes the right to file that document.

Opportunity for discovery. (Pages v-vi.)

Until February 28, 1940, there was no chance to maintain discovery. On this date, the Court denied motions to dismiss. (R. 81.)

The bank opened negotiations for settlement when we took the deposition of Mortimer Fleishhacker. (R. 775, 1507, 1508.)

There were interrogatories involving directors' loans. (R. 84.) Chickering & Gregory insisted that these constituted an investigation into the affairs of "customers". When objections were overruled, the bank answered concealing accounts totalling $3,900,000.

There was a petition for general settlement in July 1941. (R. 239.) Determination of that question delayed action until January 27, 1942, when that proposal was denied. (R. 288.)

Discovery was resumed immediately. On February 26, 1940, the bank was ordered to exhibit ledger cards and minute books. (R. 298.) Ledger cards were not examined until early in April because it was necessary to obtain photostats for our auditor. (R. 393.)

On March 30, 1942, the bank was compelled to reveal a file of letters from the Comptroller of the Currency. (R. 365.)

The damages were not ascertained until May 1942. At that time Mr. Denicke filed amended objections. (R. 403.)

Most proof material to the settlement was obtained while objections were on the calendar awaiting trial.

Stockholders' meeting July 7, 1941. (Page vii.)

This meeting was called to consider the general settlement rejected by the District Court on January 27, 1942. (R. 288.) It was not conducted in a manner that would reflect the opinions of stockholders. Management proxies voted most of the common. (R. 1047.) These proxies were solicited without disclosure of material facts. (R. 251, 253,

254.) Voting power obtained without a full and fair disclosure is not binding for any purpose.[10]

Cross-examination in July 1941. (Page viii.)

There was no opportunity to confront witnesses with documents and records obtained after March 31, 1942. On cross-examination we propose to use the following material:

1. Correspondence with Comptroller of the Currency examined under Court order dated March 30, 1942. (R. 365.)

2. Minute books of bank examined in March and April, 1942, pursuant to Court order dated February 26, 1942. (R. 298.)

3. Letter from bank to Comptroller of the Currency under date July 11, 1933, for delivery of duplicate bank examiners' reports to RFC. (R. 660.)

4. Deposition of director Walter E. Buck taken March 26, 1942. (R. 888 at 891-894.)

5. Deposition of H. L. Machen, bank officer and former Federal Bank Examiner, taken April 24, 1942. (R. 879-886.)

6. Certified copy of entry in report filed by RFC with the secretary of the United States Senate in June, 1933, pursuant to 15 USCA 605b(b) disclosing interest rate

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[10] *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.*, 98 Fed. (2d) 416, cert. denied 305 U. S. 650, rehearing denied 305 U. S. 676; *Securities & Exchange Commission v. O'Hara Re-Election Committee*, 28 Fed. Supp. 523; *Gross Iron Ore Co. v. Paulle*, 156 N. W. 268 (Minn.); *Elggren v. Wooley*, 228 Pac. (Utah) 906; *Keenan v. Eshleman*, 2 Atl. (2d) 904 (Del. 1938), 120 ALR 227; *Ford v. Ford Roofing Co.*, 285 S.W. 538 (Mo. 1926); *Loft Inc. v. Guth*, 2 Atl. (2d) 225 (Del. Ch. 1938); *Continental Securities Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138, Ann, Cas. 1914A 777 at 778, 781.

fixed on the September Company loan discussed at pages 80-82 of our brief.

7. Auditor's report prepared in May, 1942, showing a loss of $4,029,449.52, and that settlement would pay only five percent of the sum.

Transcript on appeal. (Pages xi-xii.)

The bank opposed printing of a record that would include proceedings after judgment. That issue was determined in our favor by an order entered by Circuit Judges Garrecht, Haney and Healy on March 25, 1943. (R. 1892, 1953.)

Judge Haney died before argument on the merits.

Circuit Judge Garrecht was eliminated from the panel. That action has never been explained.

Circuit Judge Healy sat with two judges not originally assigned, to enter a judgment in violation of Court Rules.

The irregular opinion filed by Judge Healy on March 1, 1944, exhibits a disregard of the identical documents which he approved as a part of the record by the order entered on March 25, 1943. (R. 1953.)

Scope of appeal. (Page xii.)

This appeal includes review of an order denying a motion to vacate. Where the action of a District Court is arbitrary, or in excess of its discretion, or where there is a failure to exercise discretion—appellate review will extend to such ruling.[11]

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[11]Notice of appeal specifies judgment and also order denying motion to vacate. (R. 746.) Appeal sustained by: *Mattox v. United States*, 146 U.S. 140, 147; *Stetson v. Stindt*, 279 Fed. 209; *Ogden v. United States*, 112 Fed. 523 at 525; *Dwyer v. United States*, 170 Fed. 160; *Paine v. St. Paul Union Stock Yards Co.*, 35 Fed. (2d) 624.

There was no merit in the bank's objection to use of narrative statements taken from depositions. The originals were on file and could be examined on request. The witnesses were parties whom petitioners could cross-examine. The testimony could be used even though the witnesses refused to sign. (Rule 26(d) sub. 1 FRCP.) The transcript of that testimony was subject to the jurisdiction of the Court. The notary was bound to certify and return such record on request. (Rule 30 FRCP.) This was the procedure followed. All depositions were duly authenticated and on file before presentation of our motion to vacate.[12]

The bank refused to permit us to open these depositions. It was not interested in inspecting their contents. Its only interest consisted in arguing about the fact that the depositions had not been opened.

Under Rule 75(c) FRCP, narrative statements were permitted. The bank waived its right to insist on printing of the entire record. In view of its conduct, the bank is estopped from maintaining any objection to that record at this time.

Standards Required for Approval of Settlement.

The bank's case was not even sufficient on motion for nonsuit. This is clear from the failure of counsel to establish the following:

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[12]Mortimer Fleishhacker (R. 775); Herbert Fleishhacker (R. 791 at 843, 844); Frank Moss (R. 875 at 879); Walter E. Buck. (R. 887 at 894.) Counsel were given opportunity to cross-examine before transcripts were completed. See statement in Herbert Fleishhacker deposition at R. 843.

Damages. Neither the opinion nor the evidence tendered by the bank is sufficient to disclose the amount of the loss.[13]

Extent of Liability. There was no proof of the extent to which directors were involved. The bank acted through counsel who were under disqualification. It pretended that its directors were not responsible.

Financial Responsibility. We tendered proof in July 1941. (R. 1476-1477.) The Court reserved our right to make that showing. (R. 1447.)

Settlement Negotiations. The bank made no disclosure regarding its conduct in handling the settlement. In view of its fiduciary relation—the bank and its counsel were bound to make a frank and complete statement in the District Court. If no greater amount could be obtained—the Court was entitled to the reasons supporting that conclusion.

The District Court had no power to enter a decree under Rule 23(c) FRCP, without maintaining the proper standards. We cite:

Case v. Los Angeles Lumber Products Co., 308 U.S. 106;

National Surety Co. v. Coriell, 289 U.S. 426;

SEC v. United States Realty, 310 U.S. 434;

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[13]Ernest Bergest, a bank employee, produced some ledger cards in response to subpoena. He said these were so complicated that he could not understand them without detailed study. (R. 1273-1274; 1407.) These contained no proof of loans of any directors except defendants Shoup, McKinstry and Tilden. There was no evidence bearing on the other accounts set up in the amended objections filed May 20, 1942. (R. 405-406.) Ledger cards of Empire Farms were insufficient to show loss even in that case because other bank records were needed to determine offsets.

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510;
Kelley v. Everglades Dist., 319 U.S. 415;
Cohen v. Young, 127 Fed. (2d) 721.

Regardless of the action taken on nonsuit motion, petitioners were entitled to a hearing on their objections. These objections frame issues within the scope of those cases, viz.:

1. The exact amount of damage sustained on the claims joined in suit. (Offers Nos. 13, 14; R. 513-516.)

2. Nature and extent of directors' liability—persons involved. (Offer No. 3; R. 490; Offer No. 2; R. 484.)[14]

3. Documentary proof available to support charges.[15]

4. Compulsory investigation into conduct of persons handling the negotiation. (Offers Nos. 20, 24; R. 522, 528.)

5. Amount collectible on a negotiation handled by independent counsel. (Offer No. 24; R. 528.)

6. Reasons for failure to employ independent persons to act on behalf of shareholders. (Offer No. 20; R. 522 at 524.)

7. Financial responsibility of persons to be released by settlement. (Offer No. 19; R. 521.)

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[14]The decisions recognize absolute liability of directors where guilty of abdication of duty. See *Thomas v. Taylor,* 224 U.S. 73 at 82; *Jones National Bank v. Yates,* 240 U.S. 541 at 555; *Goess v. Ehret,* 85 Fed. (2d) 109 at 110; *Federal Deposit Insurance Corp. v. Mason,* 115 Fed. (2d) 548 at 550; *Michelsen v. Penney,* 135 Fed. (2d) 409 at 418-419.

[15]In case at bar, the directors' minute book and correspondence in bank files established a case of liability, against which a defense would be impossible. (R. 365, 507.)

Conclusions.

The record contains nothing except the bank's case on the petition.

That case is insufficient even on motion for nonsuit.

A trial on objections was demanded and denied.

The record is conclusive. It calls for a hearing on these objections conducted in accordance with the Fifth Amendment.

Counsel Fees.

The following statement appears at pages 8-10 of the brief of respondents R. Stanley Dollar and Mortimer Fleishhacker:

> ". . . petitioners say that the plaintiff can act as a dog in the manger and, at his whim or caprice, block a settlement which the Court, after full hearing, concludes to be in the interest of the corporation. . . . It is not surprising that the trial judge in his opinion stated that 'the actions of Mr. Sargent in relation to a settlement of the litigation and the securing for himself of attorney's fees and expenses were without the knowledge and sanction of the Court.' "

By objecting to a settlement, we have sought only a full hearing—a complete investigation—and a recognition of the standards required in Chandler Act cases. We have approached this problem with a complete disclosure of our conduct in this case. More than three years ago, Mr. Denicke offered to cooperate with any group in a position to act impartially. This offer is contained in a letter presented to William H. Thomson, the President, on May 28, 1941. We quote therefrom:

> "In discussions with you there was reference to allowance for services and expenses in connection with this litigation. A form of contract was submitted under which I would be willing to adjust this amount in a manner which will result in savings to both parties. At such time as may be appropriate I am prepared to discuss what is proper in regard to this. If it is not possible to arrive at an agreement, I will present the matter to the court and ask for an appropriate order. That subject should be taken up after we have determined upon the amount to be paid the bank and have made collection." (R. 1651 at 1666.)

The District Court has control of all allowances in a stockholders' suit. (Rule 23(c) FRCP.) An order in such cases is made out of the proceeds of a settlement. The amount is fixed by Court order.

It was the bank and not petitioners who raised this question. Thomson asked for a statement. (R. 1107.) He subsequently requested presentation of the contract mentioned in the District Court. The services described therein were not limited to this action. There were six independent suits. Substantial services were rendered in each. (R. 1089.) Without a detailed review of relevant facts it is impossible to determine the allowance which would be proper. We are not enlarging on that question because it has no bearing on the matters before this Court.